SIMON BURN
SOLICITORS

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Commercial Law UPDATE

No-Fault Eviction to End: Landlord and Tenant Law Revisions Likely

Talk to a tenant and the lack of security of tenure is often brought up as a significant issue. For landlords, the inability easily to obtain possession of a tenanted property can often cause angst.

There is little dispute that a good-quality, settled tenancy is of benefit to both. With the private rented sector now constituting nearly 20 per cent of all households, the Government recognises the need for longer, more secure tenancies and launched a consultation on the subject in July 2018, receiving nearly 9,000 responses.

The principal issue for tenants was identified as being that because

'no-fault' eviction can take place with as little as two months' notice, 'people renting from private landlords have been left feeling insecure by short fixed-term tenancies, unable to plan for the future or call where they live a home'.

The Government has therefore decided to put an end to no-fault eviction by repealing Section 21 of the Housing Act 1988, and to protect landlords' interests by strengthening Section 8, so that those wishing to regain a property in order to live in or sell it will have an easier process. In addition, the Government has promised to simplify the court processes for gaining possession of let properties where circumstances allow it.

A further consultation will now take place to consider how to deal with the outstanding issues.

For advice on any aspect of landlord and tenant law, contact us.

Construction Industry VAT Changes Ahead

Businesses in the construction industry are reminded that on 1 October 2019 the new VAT domestic reverse charge will come into force. This is being introduced as an anti-fraud measure and will see a major change in accounting for VAT on some construction services. When it applies, the customer will become the party responsible for accounting for the VAT on the supply made to them. It is a change in 'B2B' sales: it does not apply to supplies made to end-users such as domestic purchasers.

As is usual with VAT, there are many complexities. However, in basic terms the VAT-registered supplier will issue a VAT invoice in the normal way, with a confirmation that the reverse charge applies to the supply, and the VAT-registered customer will pay the net amount of the invoice to the supplier: the VAT will be declared as output tax on the purchaser's VAT return and also reclaimed as input tax on the purchaser's return.

Compliance with the new regime will undoubtedly cause issues, especially as it is rather non-intuitive in operation.

If you are in any doubt about how to comply with any of your legal obligations, take professional advice.

Taking Pensions While Making Contributions – Beware!

It is probably not widely known that there is an annual limit of £40,000 that can be put into an individual pension plan. Even less well known is that if you take a pension from a money purchase scheme in any tax year, the limit that can be contributed and attract Income Tax relief falls to £4,000…so accessing a small pension pot can do more harm than good.

Your pension planning is too important to leave to chance. Take professional advice.

Pension Scheme Trustee Obligations Limits Clarified

Trustees of employer pension schemes have a number of duties they must fulfil, but there are also limits on their obligations to both the employer funding the scheme and the employees who benefit from it.

In a recent court case, the issue was raised as to whether the pension scheme trustees had a duty to warn a person considering early retirement on the grounds of ill health that they might be financially better off if they did not take the early retirement benefits (in this case because of the impact on the level of state benefits that could be claimed). The Pensions Ombudsman ruled that the trustees did not have that responsibility.

In a second case, the pension scheme trustees were ruled not to be responsible for the failure to advise a terminally ill scheme member that should they decide to take the lump sum available from the scheme in such circumstances, this would result in the loss of the lump sum death benefit.

For advice on the law relating to the management of occupational pension schemes and trustee responsibilities, or to fully understand the effect the scheme rules may have on your financial wellbeing as a scheme member, contact us.

Pension Trustees Owe No Duty of Care to Employer

Many directors of companies are also trustees of the company pension scheme. Sometimes, their duties as a director and as a scheme trustee can be difficult to reconcile. In a recent case, a company alleged that two directors who were trustees of its pension scheme had breached their duties as trustees and their fiduciary duties to the company.

The details of the dispute are not significant but the implications of the decision are. The argument was that the trustees of the scheme had a duty to take the employer's interests into account when exercising their functions as pension scheme trustees.

The High Court decisively rejected that argument, concluding that a trustee cannot serve two masters and does not owe a fiduciary duty to the employer sponsoring the scheme. Those interests, if considered, should not override the duty towards the scheme's beneficiaries.

New Company Disclosure Requirements On the Way

The trend towards full disclosure and openness continues unabated in business, and new regulations are being mooted that will increase the amount of disclosure required of UK-registered companies regarding their principals.

Currently, even the smallest company must disclose who its officers and the beneficial owners of its shares are, and company officers' records show all the companies they are currently involved with or have been in the past, including those that have ceased to exist.

However, it is considered that the existing level of disclosure is insufficient to deter the abuse of the corporate structure by unscrupulous people and that the information held is often unreliable.

Accordingly, the Government has come up with new proposals to allow Companies House to undertake identity checks on those who set up new companies or are involved in the running of companies, and to cross-reference that information with other sources in order to prevent false claims that accounts have been audited by well-known accounting firms, the appointment of 'ghost' directors (often well-known individuals) and the use of fake addresses. It is intended that transgressions will meet with penalties for those involved.

A consultation exercise is ongoing and legislation is expected in 2020.

Court Refuses Smash and Grab Application

When an insolvent company enters a corporate voluntary arrangement (CVA) in order to try to turn itself around, a process is followed by which the CVA proposal is considered by the creditors and will be put into effect if a majority agree. CVAs normally involve a rescheduling or partial waiver of the debts due to creditors.

Once the CVA has cleared that hurdle, it will bind the unsecured creditors and those secured creditors who have agreed to it.

In a recent case, a couple who were having a house built for them went to adjudication with the builder when they found the workmanship to be substandard and there were unacceptable delays in the completion of the work. The builder issued an application for payment for more than £200,000. The couple failed to issue a pay less notice, but made a payment of £30,000. The dispute went to adjudication and the adjudicator ruled that the couple should pay the demand for payment in full, less the payment on account, on the ground that they had failed to issue a pay less notice.

They failed to comply with the adjudicator's ruling and the builder went to court to enforce it. This is called a 'smash and grab' application in the building trade. Meanwhile, the builder entered into a CVA.

The couple opposed the application. They claimed that the builder's financial position was such that if they made the payment in full, any sum that might be due to them under

their counterclaim regarding the poor workmanship would be at risk and they might receive only a small proportion of the value of their claim.

The CVA was entered into on the basis that claims and counterclaims with creditors at the date of the CVA should be netted off. Therefore, a creditor of the business at the date of the CVA would have 100 per cent set-off, but the couple would pay 100 per cent of the adjudication award and then receive only a minimal amount of their counterclaim. This would benefit the other creditors.

The Technology and Construction Court did not agree that the payment should be made, meaning that the appropriate counterclaim has to be quantified before the amount payable is determined.

Are Others Benefiting From Your Goodwill?

Many successful businesses have experience of others seeking to ride on the coat-tails of their expensively established goodwill. However, as was shown by one High Court case, expert legal advice can help ensure that credit is only given where it is due.

The case concerned a newspaper publisher that had for some years held lavish awards ceremonies in recognition of high-achieving members of a segment of British society. It launched proceedings against a company that had begun to organise events targeted at a similar audience and also marketed under a very similar name, the only difference being the addition of the word 'British'.

Although only a single instance of actual third-party confusion between the rival ceremonies had been established, the Court upheld the publisher's passing off claim after finding that one example to be significant. The two names were, at first glance, extremely similar and others may have suffered confusion but not realised their mistake or not reported the matter to the publisher.

Simply by prefixing the word 'British' to the title of its events, the company had not done enough to distinguish them from those of the publisher or to stop confusion arising. The name used by the company thus amounted to a misrepresentation that its competing events were authorised by, or in some way connected to, the publisher.

The company had previously admitted that the publisher had goodwill in the name of its events and that if there had been a misrepresentation, the latter had suffered damage, or a likelihood of damage. It was also conceded that the company's sole director and shareholder would be jointly and severally liable for any such damage. The Court's decision opened the way for the publisher to seek compensation and a permanent injunction to prevent any further passing off.

If your business interests are threatened by another organisation using a name similar to yours, contact us for advice on what measures you can take.

Termination Payment Changes

The glory days of termination payments (usually made under a compromise agreement) appear to be over as the Government has introduced a Bill into Parliament that will levy a 13.8 per cent employer National Insurance Contributions (NICs) charge on any termination payment in excess of £30,000. The charge will only apply where the recipient of the termination award is not of pensionable age.

The exemption from Income Tax of the first £30,000 paid for termination of employment will remain.

The Bill also confirms that a 13.8 per cent NICs charge will apply to testimonials for sportspeople where the payment exceeds £100,000.

For full details, see the National Insurance Contributions (Termination Awards and Sporting Testimonials) Bill factsheet on the Government website (https://bit.ly/2Vchlep).

The changes are scheduled to come into effect in April 2020.

EU Opinion on Use of Cookies

Businesses that have websites will be aware of the regulations that govern the use of 'cookies'. Recently, an opinion of the Advocate General of the European Union on questions referred to the Court of Justice by the Federal Court of Justice in Germany on the use of cookies on websites stressed the need for 'active consent' by the web user to be given before a cookie is stored.

The Advocate General ruled that there is no valid consent 'where the storage of information, or access to information already stored in the user's terminal equipment, is permitted by way of a pre-ticked checkbox which the user must deselect to refuse his consent and where consent is given not separately but at the same time as confirmation in the participation in an online lottery'.

Auto-Enrolment Spot Checks On the Way

If you have a PAYE scheme but have not yet complied with the rules relating to auto-enrolment, you should do so immediately. The Pensions Regulator has announced that there will be spot checks on employers registered with HM Revenue and Customs, to uncover those that have failed to comply in full with their obligations.

In the first three months of 2019, more than 21,000 auto-enrolment 'cases' have been closed by the Regulator and fines are being levied at more than £5 million per month.

If you have staff who earn more than £10,000 per year and are aged between 22 and their state pension age, they must be enrolled into a pension scheme unless they specifically opt out.

Failure to comply can lead to a fixed penalty of £400 and escalating penalty notices will be issued if the failure continues. These can range from £50 to £10,000 per day.

Contact us if you would like advice on any of the issues raised in this bulletin or on any other commercial law matter.

SIMON BURN SOLICITORS

51 PROMENADE, CHELTENHAM GL50 1PJ
TELEPHONE: +44 (0)1242 228 444 FAX +44 (0)1242 516 888 DX 7404 CHELTENHAM
LEWIS BUILDING, 35 BULL STREET, BIRMINGHAM B4 6EQ
TELEPHONE: +44 (0)121 371 0301 FAX +44 (0)121 371 0302 E-MAIL: SIMON.BURN@SIMONBURN.COM

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PARTNER: SIMON L. BURN LLB (DIRECTOR)

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